

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 55 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?

No

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HASMUKH KARSANDAS PARMAR

Versus

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BAHADURSINGH MADHURSINGH DODIA

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Appearance:

MR SURESH M SHAH for Petitioner

MR PV NANAVATI for Respondent No. 1

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CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 28/04/99

ORAL JUDGEMENT

This Appeal under Section 100 of the Code of Civil Procedure, 1908 is directed against the judgment and order dated 9.4.1999 passed by the Appellate Bench of the Small Cause Court at Ahmedabad dismissing Civil Appeal No.66 of 1999 and confirming the judgment and order dated 18.3.1999 passed by the learned Single Judge of the Small Cause Court below Applications at Exhs. 23 & 25 in Execution Application No.177 of 1998.

2. The facts leading to filing of the present Appeal are as under:

2.1 Shri Bahadursing Madhusing Dodiya, the respondent herein, filed H.R.P. Suit No.1305 of 1990 against the defendant - Karsandas Gordhandas Parmar under the provisions of the Bombay Rent Act, 1947 for a decree of eviction inter alia on the ground that the defendant tenant had acquired suitable alternative accommodation and that the plaintiff reasonably and bona fide required the suit premises for his own occupation as he was going to retire in the year 1994. Before the trial court, the plaintiff examined himself as a witness and also examined the Administrator of Subhlaxmi Housing Cooperative Society where the defendant - tenant's house was being constructed. On behalf of the defendant, his son Narendra Karsandas Parmar was examined as a witness at Exh.44 stating that the house in Subhlaxmi Housing Cooperative Society was constructed by his father but the construction was not completed. After hearing Shri G.M.Pandya, learned Advocate for the original plaintiff and Shri J.R.Jani and Shri D.K.Vyas, learned Advocates for the defendant, the trial court delivered judgment and decree dated 11.12.1995 decreeing the plaintiff's suit and directing the defendant to hand over vacant and peaceful possession of the suit premises to the plaintiff on the ground that the defendant had acquired suitable alternative accommodation and also on the ground that the plaintiff reasonably and bona fide required the suit premises for his own occupation. The standard rent of the suit premises was also fixed at Rs.200 per month (inclusive of taxes) which was also the contractual rent.

2.2 Civil Appeal No.20 of 1996 came to be filed by the two Sons (including the present Appellant) and two Daughters of Karsandas Gordhandas Parmar (original defendant) as his heirs and legal representatives. In the said Appeal, the appellants i.e. the sons and the daughters of Karsandas Gordhandas Parmar, filed the Application for permission to prosecute the appeal as original defendant Karsandas Gordhandas Parmar had left the house in 1994. Permission was granted.

The Appeal was heard on merits. The Appellate Court reversed the finding that the defendant had acquired suitable alternative accommodation, since even according to the Administrator of Subhlaxmi Housing Cooperative Society, the construction of the house of the defendant was not completed as the construction was done only upto lintel level. However, the Appellate Court confirmed the finding of the trial court that the suit

premises was reasonably and bona fide required by the plaintiff and that greater hardship would be caused to the plaintiff - landlord if decree of eviction was not passed. The Appellate Bench of the Small Cause Court dismissed the Appeal on 15.9.1998 and gave time to the Appellants to vacate the suit premises by 31.10.1998.

2.3 Aggrieved by the above judgment and decree, the sons (including the present Appellant) and the daughters of Karsandas Gordhandas Parmar (original defendant) filed Civil Revision Application No.1545 of 1998. In the said revision application, the judgments of the courts below were assailed on merits, particularly the finding that the suit premises was reasonably and bona fide required by the plaintiff landlord and the further finding that greater hardship would be caused to the landlord if the decree of eviction was not passed. After hearing the learned Counsel for the parties, this Court (Coram: Mr.Justice D.C.Srivastava) dismissed the revision application on merits on 19.2.1999.

2.4 The present Appeal arises from the order passed by the Executing Court rejecting the Obstruction Application filed by Hasmukh Karsandas Parmar, who was Appellant No.1/1 in Civil Appeal No.20 of 1996 and Petitioner No.1/1 in Civil Revision Application No.1545 of 1998. The Obstruction Application (Ex.23) was filed on the ground that the decree passed by the trial court was a nullity. It was stated by the present Appellant that the original defendant - Karsandas Gordhandas Parmar i.e. the father of the Appellant, because of his unsound mind, left the house on 26.11.1994 without the knowledge of the members of the family. On the very next day i.e. 27.11.1994, the Police was informed but he had not returned till the date of filing the Obstruction Application at Ex.23 on 11.3.1999. It was alleged that, since the original defendant was of unsound mind, it was necessary to appoint a guardian before proceeding with the suit and that since the suit was decreed without any such appointment of guardian, the decree was a nullity. It was further contended that the defendant had disappeared and therefore, for all practical purposes the plaintiff-landlord had obtained a decree against a dead person and as such the decree was a nullity and therefore this Obstruction Application (Ex.23) was filed by one of the sons of the original defendant Karsandas Gordhandas Parmar under Order 21 Rule 97 of the Code of Civil Procedure. Application at Ex.25 was given by the landlord - decree holder to remove the obstruction.

2.5 The Executing Court rejected Obstruction

Application at Ex.23 by its judgment and order dated 18.3.1999 observing that in view of the decision of this Court in Chandravati Society v. Bhairavnath Society Trust reported in 1993 (1) G.L.R. at page 116, there is no necessity to observe the procedure laid down under Order 21 Rule 97 and other provisions to remove the objections, if the objector is a judgment-debtor himself.

2.6 Aggrieved by the above judgment and order, the defendant carried the matter in appeal before the appellate Bench of the Small Cause Court by filing Civil Appeal No.66 of 1999 which has been dismissed by the judgment and order dated 9.4.1999. It is against this judgment and order that the present Second Appeal has been filed.

3. The learned Counsel for the Appellant Mr.S.M.Shah submitted that, since the judgment creditor- plaintiff himself had stated in the Execution Application (page 32 of the paper-book) that original defendant - Karsandas Gordhandas Parmar had expired during pendency of the suit and his heirs were joined as defendants or judgment-debtors and since the original decree dated 11.12.1995 was passed against Karsandas Gordhandas Parmar (the heirs were admittedly not brought on record during pendency of the suit), therefore, in view of the settled legal position that decree passed against a dead person is a nullity and cannot be executed, the Obstruction Application filed by the Appellant was required to be allowed. It was further submitted that, at the highest, the Executing Court could have passed an order for recalling the decree passed against the dead person and continued with the suit from the stage of giving the original plaintiff an opportunity to bring the heirs of the original defendant on record, but the Executing Court could not have dismissed the Obstruction Application and ordered for proceeding further with the execution of the decree which has already reached the stage of issuing warrant for possession.

4. On the other hand, Mr.P.V.Nanavati, learned Counsel for the respondent - landlord appearing on caveat, submitted that neither in Civil Appeal No.20 of 1996 nor in Civil Revision Application No.1545 of 1998 the Appellant (who was also Appellant No.1/1 Petitioner No.1/1 in the aforesaid proceedings) or any other appellant/petitioner in the said proceedings had ever raised the contention that the decree passed by the trial court was a nullity. In fact, they had themselves filed the appeal before the Appellate Bench of the Small Cause Court by contending that the original defendant had

disappeared and his sons/daughters had interest in the tenanted premises and, therefore, they were required to be heard. The Appellate Court as well as the Revision Court had given full opportunity to the Appellant and the other children of original defendant Karsandas Gordhandas Parmar to assail the decree which was earlier passed by the trial court on merits after considering the evidence on record and after hearing the learned Counsel for the parties. It is further submitted by Mr.Nanavati that the execution proceedings are continuation of the suit and in the Execution Application the sons and the daughters of defendant Karsandas Gordhandas Parmar were shown as opposite parties in view of the fact that the said parties had themselves obtained permission of the Appellate Court to file the appeal and challenge the decree, therefore, the present Appellant cannot be permitted to make capital out of the description of the Appellant and other children of defendant Karsandas Gordhandas Parmar as heirs of the original defendant.

It is further submitted that after dismissal of the Appeal by the Appellate Bench of the Small Cause Court on 15.9.1998, the plaintiff- landlord had proceeded with execution of the decree and at that time another son of Karsandas Gordhandas Parmar i.e. Narendra Karsandas Parmar (who had also given deposition before the trial court in the original suit), had filed an undertaking on affidavit (Exh.9) before the Executing Court declaring that they have approached this court (the High Court) by filing Civil Revision Application No.1545 of 1998 and, therefore, execution may be stayed. It was further stated in the said undertaking that in case of their failure in the High Court, they would vacate the premises. Incidentally, Narendra Karsandas Parmar, who gave the aforesaid undertaking, is a practising advocate.

Mr.Nanavati further submitted that all the contentions raised by the Appellant are misconceived as Karsandas Gordhandas Parmar is not said to have died during pendency of the suit or thereafter, but Karsandas Gordhandas Parmar is only said to have left his house on 26.11.1994. Since the statutory period of seven years as provided under Section 108 of the Indian Evidence Act is still not over, it cannot be said that there was death of Karsandas Gordhandas Parmar during pendency of any of the proceedings and, therefore, there is neither physical death nor civil death of Karsandas Gordhandas Parmar. Mr.Nanavati, therefore, submitted that the contention of the Appellant being nullity is totally misconceived.

5. Having heard the learned Counsel for the parties,

this Court finds considerable substance in the arguments of Mr.P.V.Nanavati that there is nothing on record to show that Karsandas Gordhandas Parmar had died during pendency of the suit and that even the Appellant's own case as well as the case of the other children of Karsandas Gordhandas Parmar was that Karsandas Gordhandas Parmar had disappeared on 26.11.1994.

6. In any view of the matter, the rule that the decree passed against a dead person would be a nullity is qualified by the provisions of Order 22 Rule 6 of the C.P.C. which reads as under:

" No abatement by reason of death after hearing:

Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

The aforesaid rule that death of a party after the conclusion of the hearing and before pronouncement of judgment does not result into abatement clearly indicates that the principal rule that decree against a dead person would be a nullity has been enacted for ensuring that the rights of a party, more particularly of the heirs of the deceased litigant, are not foreclosed if the deceased or his heirs did not have the opportunity of presenting their case before the Court. Therefore, if the defendant was alive when the evidence was led and when the arguments were heard, it makes no difference if such a defendant dies after arguments are heard.

Examining the facts of the case from this angle, it is clear that the evidence was led on behalf of Karsandas Gordhandas Parmar by one of his sons Narendra Karsandas Parmar who is a practising advocate and the arguments were also heard on behalf of the defendant and thereafter the trial court passed the decree. Hence, both the sons (including the present Appellant) and the daughters of Karsandas Gordhandas Parmar were joined as judgment-debtors. In view of non-availability of Karsandas Gordhandas Parmar, the appellate court had permitted his sons and daughters including the present appellant to assail the decree of eviction passed by the trial court and after dismissal of the appeal by the Appellate Bench on merits, they filed revision

application in this Court. This court also heard and entertained the revision application of the appellant and other son/daughters of Karsandas Gordhandas Parmar on merits. Thus, full opportunity was given to the sons and daughters of Karsandas Gordhandas Parmar to assail the decree of eviction which was passed on the basis of the evidence already produced before the trial court including the evidence led on behalf of defendant Karsandas Gordhandas Parmar.

7. The Courts below rightly relied on the decision in the case of *Chandravati Society v. Bhairavnath Society Trust* (Supra) for holding that a party to the proceedings leading to the final decree of the appellate/revisional Court cannot be permitted to obstruct the execution proceedings under Order 21 Rule 97 of the C.P.C.

8. In view of the aforesaid factual and legal position, no question of law, much less a substantial question of law, arises in this Appeal, as the courts below were fully justified in dismissing the Obstruction Application filed by the appellant under Order 21 Rule 97 of the C.P.C.

9. There is no substance in this Appeal. The Appeal is, therefore, summarily dismissed.

The request of Mr. Shah to stay the operation of this judgment to have further recourse in accordance with law is rejected.

(KMG Thilake) &&&&&&